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No. 09-800

In The

Supreme Court of the United States

NORTH COUNTY COMMUNITY ALLIANCE, INC.,

Petitioner,

v.

KEN SALAZAR, Secretary of the United States Department of the Interior; DEPARTMENT OF THE INTERIOR; GEORGE SKIBINE, Acting Chairman of the National Indian Gaming Commission; NATIONAL INDIAN GAMING COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, authorizes and regulates organized tribal gaming activities, and charges the National Indian Gaming Commission with administration and enforcement of the Act. Gaming under the Act, as well as the Commission's jurisdiction, is geographically limited to "Indian lands" as defined in the Act. Moreover, before a tribe may engage in gaming activities under the Act, the Commission must approve a gaming ordinance submitted by the tribe that governs the tribe's gaming activities.

The questions presented are:

Must the National Indian Gaming Commission establish its jurisdiction over a tribe's potential gaming sites, by determining that such sites qualify as "Indian lands", before approving the tribe's gaming ordinance?

Does the National Indian Gaming Commission act *ultra vires* when it approves a tribal gaming ordinance which allows construction and operation of a gaming facility on land which is never determined by the Commission to be "Indian lands"?

PARTIES TO THE PROCEEDING IN THE COURT BELOW AND RULE 29.6 STATEMENT

The caption of the case in this Court contains the names of all parties to the proceedings in this Court. In the proceedings below, Dirk Kempthorne was a party in his capacity as Secretary of the Department of Interior, and Philip N. Hogen was a party in his capacity as Chairman of the National Indian Gaming Commission. They have been replaced as parties by Ken Salazar and George Skibine, respectively.

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent company or publicly held company owning ten percent or more of its stock.

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OPINIONS BELOW

The opinion below was issued by a divided panel of the United States Court of Appeals for the Ninth Circuit. It is reported as *North County Community Alliance, Inc. v. Salazar* (*NCCA*), 573 F.3d 738 (9th Cir. 2009) and is reprinted in the Appendix beginning at App. 1. The panel majority upheld an unreported order of the United States District Court for the Western District of Washington that was entered on November 16, 2007, and is reprinted in the Appendix beginning at App. 32.

JURISDICTION

Petitioner timely moved for rehearing of the panel decision on September 10, 2009. The motion was denied by order entered October 6, 2009. *See* App. 54. Accordingly, this Court has jurisdiction of this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case concerns the interpretation and application of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq*. Relevant provisions of the Act are reprinted in the Appendix beginning at App. 56.

STATEMENT OF THE CASE

A. Historical background.

Congress enacted the Indian Gaming Regulatory Act in 1988 against a backdrop of increasing controversy over tribal gaming. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.01 (Nell Jessup Newton *et al.* eds., 2005). In the decade prior to IGRA's enactment, a number of tribes began operating bingo and poker parlors. *Id.* Some states asserted these facilities violated their gambling laws. *Id.* Disputes over these gaming facilities culminated in this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 302 (1987), wherein the Court held that tribes could engage in organized gaming in states that did not generally prohibit gambling.

Congress entered the fray the following year by enacting IGRA. Pub. L. 100-497, 102 Stat. 2467 (1988). IGRA was designed to balance the competing federal, state and tribal interests concerning tribal gaming, and to provide a uniform and predictable basis for the operation and regulation of such gaming, provided that it occurred on "Indian lands" as specifically defined in the Act. *See* 25 U.S.C. §§ 2701-02 (Congressional findings and declaration of policy); *see also* COHEN § 12.02(1). The National Indian Gaming Commission (NIGC) was created to administer and enforce the Act. *See* 25 U.S.C. §§ 2704-06.

B. IGRA's regulatory scheme.

Two aspects of IGRA's regulatory scheme are particularly important here. First is the requirement that all tribal gaming under IGRA take place on "Indian lands." As the Ninth Circuit recognized, "[i]t is undisputed that IGRA authorizes tribal gaming only on 'Indian lands' as defined in" the Act. *NCCA*, 573 F.3d at 744 (App. 11). Under IGRA, "Indian lands" are:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands [1] title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and [2] over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4) (bracketed numbers added); *see also* 25 C.F.R. § 502.12. Part (A) of this definition is relatively self-explanatory. Part (B), however, is not as simple. Whether a particular parcel is held in trust or subject to restriction against alienation is a fact-intensive inquiry governed by other statutes. Moreover, "governmental power" is not established by a mere assertion of "theoretical authority," but requires "concrete manifestations" of actual authority. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994).

The other feature of IGRA's scheme particularly relevant here is its division of gaming into three

classes, and the different requirements applicable to these classes. "Class I gaming" includes traditional ceremonial and social games for prizes of limited value, 25 U.S.C. § 2703(6), and is generally subject to the tribes' exclusive jurisdiction, 25 U.S.C. § 2710(a)(1). This class of gaming is not at issue here.

"Class II gaming" generally includes bingo and certain card games, but expressly excludes "banking card games" such as blackjack, and slot machines and other similar electronic gaming devices. 25 U.S.C. § 2703(7). To engage in class II gaming, a tribe must receive NIGC approval of a tribal gaming ordinance subject to the requirements of 25 U.S.C. § 2710(b).

"Class III gaming" encompasses "all forms of gaming that are not class I gaming or class II gaming," including slot machines and other electronic gaming devices. 25 U.S.C. § 2703(7)(B)(ii) and (8). Class III gaming is subject to all requirements placed on class II gaming, plus a requirement that such gaming be "conducted in conformance with a Tribal-State compact" entered into by the tribe and the forum state. 25 U.S.C. § 2710(d)(1).

C. The present case.

1. The Northwood Casino.

This case centers on the Northwood Crossing Casino (the Northwood Casino), a class II tribal gaming facility built and operated by the Nooksack Indian Tribe in Whatcom County, Washington. The Northwood Casino is not located on the Nooksack

Reservation; rather, it is located on a twenty-acre parcel purportedly held in trust by the United States for the Nooksacks amid an extensive area of non-Indian farmland about a mile south of the Canadian border. The Nooksack Reservation is in the town of Deming, Washington, about twenty miles southeast of the Northwood Casino site.

The Northwood Casino parcel was purportedly taken into trust by the United States for the Nooksacks in 1984. For over two decades thereafter, the parcel lay largely untouched. In the meantime, Congress passed the Indian Gaming Regulatory Act. Five years after the passage of the Act, the Nooksacks applied for, and the NIGC approved, a gaming ordinance pursuant to the Act.[1] The ordinance contains no references to any particular number or location of gaming sites. The tribe has operated a casino on its reservation in Deming since that time.

In 2006, the Nooksacks announced plans for a second casino, this one located on the Northwood Casino parcel. Members of petitioner North County Community Alliance objected to the NIGC that the "Indian lands" status of the Northwood Casino parcel was not clear, and requested the NIGC to make an "Indian lands" determination with respect to the

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[1] Copies of the Nooksack Gaming Ordinance and of the NIGC letter confirming approval are available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/nooksack/nooksackord102793.pdf (retrieved Dec. 29, 2009).

parcel. The Alliance is a non-profit corporation that seeks to protect the environment, preserve the peace and quality of life for the citizens of Whatcom County and to insure all applicable laws are followed in connection with proposed development projects in northern Whatcom County that could negatively impact the environment and nearby communities. The Alliance's members include residents, property owners, and Nooksack Indian Tribe members who are negatively affected by the construction and operation of the Northwood Casino.

Despite the Alliance's objections, the NIGC took no action regarding the "Indian lands" status of the Northwood Casino parcel, even though such status is essential for a tribe to establish a gaming facility under IGRA, free from state and local regulation of both the construction and operation of the facility.

In light of the NIGC's position that no "Indian lands" determination need be made, there has never been a forum for consideration of the Alliance's arguments that the Northwood Casino site does not qualify as "Indian lands." If such a determination must be made, the Alliance would raise to the NIGC several reasons this site did not qualify as "Indian lands," including the lack of any historical exercise of tribal governmental power on this site. Nevertheless, whether the Northwood Casino parcel qualifies as "Indian lands" is not a question before the Court – a point recognized by the Ninth Circuit below. *See NCCA*, 573 F.3d at 743 (App. 10).

2. Procedural history.

The Alliance filed suit in the United States District Court for the Western District of Washington seeking, *inter alia*, a declaratory judgment ordering the NIGC to make a determination regarding the "Indian lands" status of the Northwood Casino parcel. Defendants filed a motion to dismiss which the court granted. The court asserted that the Alliance's claims were barred by the applicable statute of limitations, App. 36-43, and that IGRA placed no duty on defendants to make an "Indian lands" determination regarding the Northwood Casino parcel, App. 44-50.

The Alliance appealed the District Court's dismissal to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §§ 1291 and 1294. The panel issued a divided opinion reversing in part and affirming in part. The court unanimously held that the Alliance's claims were not time barred. *See NCCA*, 573 F.3d at 742-43 (App. 6-9) (majority), 749 (App. 24) (Gould, J., concurring in part, dissenting in part). However, the panel majority held that the Commission did not act beyond the scope of its authority when it approved the Nooksacks' gaming ordinance without first determining the "Indian lands" status of the Nooksacks' potential gaming sites, and that nothing obligated the Commission to make such a determination upon the announcement or construction of the Casino. The panel majority claimed that it would be impractical for the NIGC to make such determinations, and that there is nothing in IGRA's text that expressly requires the NIGC to

make such a determination. *NCCA*, 573 F.3d at 744-47 (App. 11-19).

Judge Gould dissented from the majority's holding on this point. Judge Gould observed that the majority's decision left "Indian lands" determinations wholly within the NIGC's discretion, a result completely contrary to Congressional intent, IGRA's stated purposes, and the necessary assumptions underlying the statute as a whole. *Id.* at 749-51 (App. 26-31). He also noted that the NIGC "cannot allow construction of a new gaming facility before it determines that it has jurisdiction over that specific site." *Id.* at 751 (App. 28).

The Alliance now petitions this Court for a writ of certiorari to the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's opinion decided an important question of federal law that has not been, but should be, settled by this Court.

This Court has never addressed whether the NIGC may approve a tribal gaming ordinance without first determining the "Indian lands" status of sites where the tribe would engage in gaming activity. The importance of this question, however, is manifest.

There are currently 564 federally recognized tribes nationwide according to the Bureau of Indian

Affairs. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 (Aug. 11, 2009). While the numbers are constantly fluctuating, approximately 239 of these tribes currently operate over 450 gaming operations in twenty-nine states,[2] generating $26.7 billion in revenue for the fiscal year ending in 2008.[3] Moreover, in light of the promise that organized gaming has shown as a tool of tribal economic development, these numbers are increasing all the time. In the fiscal year ending in 1998, there were only 297 tribal gaming operations that generated $8.5 billion in revenues.[4] Prior to IGRA's passage in 1988, tribal gaming activities generated revenues only around $212 million per year, *see* COHEN § 12.01 – or less than one percent of 2008's figure.

Thus, the nationwide import of tribal gaming and its regulation is clear. Congress enacted IGRA to provide a uniform and predictable "statutory basis for the operation and regulation" of this gaming. *Seminole Tribe v. Florida*, 517 U.S. 44, 48 (1996). In particular, Congress sought to balance federal, state, tribal and local rights and interests by limiting tribal

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[2] *See* Nat'l Indian Gaming Comm'n, GAMING TRIBE REPORT (SORTED BY STATE) (Nov. 9, 2009), available at http://www.nigc.gov/LinkClick.aspx?fileticket=lGmrRJwYRN0%3d&tabid=68 (retrieved December 29, 2009).

[3] *See* http://www.nigc.gov/Default.aspx?tabid=67 (retrieved Dec. 29, 2009) for the relevant reports.

[4] *Id.*

gaming activities to "Indian lands" on the one hand, and freeing the tribes from the widely varying strictures of state law on the other. The Ninth Circuit's decision, if allowed to stand, shatters this balance – significantly increasing the likelihood that gaming will occur on non-Indian land, yet cloaking that gaming with the imprimatur of a gaming ordinance approved by the federal government.

Indeed, whether gaming should be allowed on a particular site implicates important questions of federalism. This is because the NIGC holds the key to trumping the applicability of local and state regulation of gaming. It is critical that this Court decide whether the NIGC can approve a tribe's gaming ordinance, and thereby preempt state and local regulations, without expressly determining that the gaming facilities that operate pursuant to such an ordinance are located on "Indian lands" as mandated by IGRA. A decision on this question is essential in guaranteeing states and local communities that tribal gaming is limited to those locations authorized by federal law. It is equally essential to tribes wishing to engage in gaming to know that their proposed sites qualify for gaming under IGRA.

Finally, while the Ninth Circuit's decision obviously is binding only within its own jurisdiction, it will undoubtedly influence the NIGC's regulation of gaming nationwide, even when acting outside the Ninth Circuit. Accordingly, this Court should grant the Alliance's petition.

B. The Ninth Circuit's opinion conflicts with fundamental aspects of this Court's administrative law jurisprudence.

While this Court has not answered the precise question presented in this case, it has spoken repeatedly regarding the limits on the powers of administrative agencies. The Ninth Circuit's opinion below contravenes this jurisprudence and approves *ultra vires* action on the part of the NIGC. In particular, the panel decision allows the NIGC to exceed its statutory power by approving a tribal gaming ordinance without first establishing that it has jurisdiction over the gaming that will occur under the ordinance.

It is a long-standing principle of this Court's jurisprudence that "[a]n agency may not confer power upon itself." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Rather, "an agency . . . has no power to act . . . unless and until Congress confers powers upon it." *Id.*; *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Moreover, courts "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Brown & Williamson*, 529 U.S. at 161.

In determining whether an agency has the power to take a certain action, the words of the authorizing "statute must be read in their context and with a view to their place in the overall statutory scheme."

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666 (2007). Indeed, "[s]tatutory construction . . . is a holistic endeavor." *United Savs. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (internal quotations and citations omitted).

This Court has applied these principles in numerous cases. A couple are particularly instructive here. In *Brown & Williamson*, the FDA asserted that it had jurisdiction to regulate tobacco products pursuant to its authority to regulate drugs under the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq*. This Court rejected that assertion, finding that the FDA lacked statutory power to regulate tobacco and striking down its regulations. The Court reasoned that the FDA assertion of authority contravened the essential purposes of the act, 529 U.S. at 133-34, the logical underpinnings of the act, *id*. at 134-43, as well as the requirements of other statutes regulating tobacco products, *id*. at 143-58.

Similarly, in *Ragsdale*, the Secretary of Labor claimed authority to exclude, via regulation, certain days from an employee's entitlement under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 260 *et seq*. This Court rejected this assertion and found that the regulation exceeded the Secretary's authority under the FMLA. Viewing the FMLA as a whole, the Court reasoned that the regulation was

contrary to the FMLA's overall remedial design, 535 U.S. at 88-90, altered the FMLA's cause of action in a fundamental way, *id.* at 90-91, and failed to give effect to the policy compromises embodied in that act, *id.* at 93-94.

Here, similar factors compel the conclusion that the NIGC lacks the power to approve a tribal gaming ordinance without first establishing its jurisdiction over the sites where gaming will occur pursuant to the ordinance. As noted above, it is undisputed that IGRA only authorizes tribal gaming on "Indian lands" as defined in the Act, and that the NIGC's jurisdiction only extends to gaming that occurs on "Indian lands." Also, as noted above, all gaming under IGRA (except for traditional ceremonial games not relevant here) must be conducted pursuant to a tribal gaming ordinance approved by the NIGC.

Given this combination of limitations and requirements, the NIGC cannot approve a tribal gaming ordinance without first ensuring that the gaming that occurs under that ordinance is conducted on "Indian lands" within the NIGC's jurisdiction. "The NIGC, like all federal agencies, does not have authority that expands beyond what Congress has delegated to it." *NCCA*, 573 F.3d at 751 (App. 28) (Gould, J., dissenting). Here, the NIGC lacks the power to approve any tribal gaming ordinance that authorizes, or could be construed to authorize, gaming on land not constituting "Indian lands."

An analysis of IGRA's text confirms this conclusion. As noted above, one must "look[] to the provisions of the whole law, and to its object and policy" when interpreting a statute. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993). Looking at the "provisions of the whole law" here, the extent to which all activities under IGRA are limited to "Indian lands" is striking. For example, all three "classes" of gaming authorized in IGRA are approved subject to the proviso that they occur on "Indian lands." *See* 25 U.S.C. §§ 2710(a)(1), (a)(2), (b)(1), (d)(1). Moreover, one of IGRA's expressly declared purposes is the establishment of an "independent Federal regulatory authority for gaming on Indian lands," 25 U.S.C. § 2702(3) (emphasis added) and to provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3) (emphasis added). All of these provisions presuppose that the NIGC will determine whether particular gaming facilities are on "Indian lands." Indeed, as noted by Judge Gould, "[w]ith these findings Congress could not have intended to create a regime where the NIGC did not have to make Indian lands determinations." *NCCA*, 573 F.3d at 750 (App. 27).

The limitation to "Indian lands" is also present in the provisions governing the content and approval of tribal gaming ordinances. On balance, IGRA indicates that tribes may not simply offer a non-site-specific gaming ordinance for NIGC approval, and then build and operate as many gaming facilities as they wish, free from further scrutiny regarding IGRA's basic,

threshold requirements. IGRA quite directly states that "[a]n Indian tribe may engage in, or license and regulate, class II gaming," but only on "Indian lands within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1); *see also* §§ 2702(3), 2706(b). It goes on to provide:

> The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that
>
> . . . .
>
> (E) the **construction** and maintenance **of the gaming facility**, and the operation of that gaming is conducted in a manner which **adequately protects the environment and the public health and safety**;

25 U.S.C. § 2710(b)(2) (emphasis added).

This subsection rather plainly contemplates that the NIGC has a responsibility to determine whether the construction of any individual "gaming facility" is occurring on "Indian lands" and whether such construction is being conducted "in a manner which adequately protects the environment and the public health and safety." The NIGC simply cannot fulfill this purpose of protecting the environment and public health and safety if it can approve a gaming ordinance which authorizes the construction and operation of a gaming facility at any location.

Indeed, the statute does not contemplate a blanket approval of untold numbers of gaming facilities that may exist in the future and in unknown locations. Rather, it only speaks of "the gaming facility" presumably known to the NIGC during its deliberations.

The Ninth Circuit majority tried to refute this argument on two grounds. First, it noted that, in practice, most gaming ordinances presented to the NIGC are not site-specific. *NCCA*, 573 F.3d at 746 (App. 18). But there is nothing in the record to support this assertion, nor does it say anything about whether, under the statute, tribal gaming ordinances need to be site-specific. Moreover, assuming the panel's assertion is true, acceptance of this practice has the curious effect of burdening those tribes who are more forthcoming regarding their gaming plans to greater scrutiny, while potentially rewarding those who keep their plans close to the vest or are misleading.

The majority also contended that the Alliance's textual analysis was overly cramped, asserting that if the phrase "the gaming facility" is read literally, each tribal gaming ordinance would be limited to a single gaming facility. *NCCA*, 573 F.3d at 746 (App. 17-18). But the Alliance has never made this argument – indeed, as the Ninth Circuit observed, IGRA plainly contemplates that a tribal gaming ordinance may cover multiple gaming facilities. *Id.* at 746-47 (citing 25 U.S.C. § 2710(b)(1)). Rather, the Alliance has simply argued that if one looks to the provisions of the whole law, and to its object and policy – as one

must – it is clear that the NIGC has environmental and public safety responsibilities under the statute, as well as jurisdictional limitations, that can only be satisfied by determining the "Indian lands" status of potential gaming sites before it approves a tribal gaming ordinance.

The Ninth Circuit asserted that such a requirement is impractical. *NCCA*, 573 F.3d at 746 (App. 17). However, as the majority itself noted, the NIGC has recently promulgated new regulations that require tribes to submit "Indian lands" information to the Commission when the tribe submits a proposed gaming ordinance for approval, or when it seeks to open a new gaming facility. *Id.* at 747-48 (App. 19-20) (citing 25 C.F.R. §§ 522.2 and 559). Critically, the NIGC's regulations stop short of requiring the NIGC to make public "Indian lands" determinations for proposed gaming sites. Nonetheless, given these regulations, the NIGC will have all the information it needs to make such determinations without any undue burden being placed on the Commission.

Finally, requiring such determinations prior to the approval of a tribal gaming ordinance comports with the IGRA's policies and the necessary assumptions underlying the statute. Some of these have already been discussed – specifically, Congress's overarching policy of limiting tribal gaming to "Indian lands." Beyond this, however, Congress also sought to provide Indian tribes with a vehicle for economic development and tribal self-sufficiency. *See* 25 U.S.C. §§ 2701(4) and 2702(1).

The Ninth Circuit's decision jeopardizes this goal. As Judge Gould observed, "[a]llowing an Indian tribe to construct a gaming facility before the tribe knows whether the federal government will recognize it as within its tribal jurisdiction frustrates the goal of promoting tribal economic development and self-sufficiency." 573 F.3d at 750. Indeed, while many tribes may benefit from withholding their intentions regarding possible gaming sites, other tribes may find economic calamity following such a course if it is later determined that a particular gaming facility is not on "Indian lands." In this event, all state and local gambling laws, and all federal laws apart from IGRA, apply. *Id.* As noted by Judge Gould, these laws:

> may be stringent or prohibitive, thus depriving the Indian tribe of their planned economic revenue, and rendering its investment in the gaming facility an economic liability. Such an event would hinder the principal goals of federal Indian policy of promoting self-sufficiency and economic development.

Id. Accordingly, the Ninth Circuit's decision conflicts with this Court's administrative law jurisprudence and should be reviewed.

C. The Ninth Circuit's opinion conflicts with the decisions of other courts that have addressed the questions presented.

While no other court of appeals has addressed the questions presented here, other lower federal

courts have. And those courts agree that the NIGC cannot approve tribal gaming ordinances without first determining whether the Commission has jurisdiction over the gaming that will occur under the ordinance.

The principle conflict lies with a decision out of the Western District of New York. That court recently held that:

> the findings, purpose and language of the IGRA relative to the NIGC's jurisdiction implicitly require such a determination. Whether proposed gaming will be conducted on Indian lands is a critical, threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands. If gaming is proposed to occur on non-Indian lands, the Chairman is without jurisdiction to approve the ordinance.

Citizens Against Casino Gambling in Erie County v. Kempthorne (*Erie County*), 471 F. Supp. 2d 295, 323-24, *reconsideration granted on other grounds*, 2007 WL 1200473 (W.D.N.Y. 2007).

Similarly, in *Apache Tribe v. United States*, No. 04-1184, 2007 WL 2071874 (W.D. Okla. 2007), the Western District of Oklahoma reviewed the NIGC's approval of a state-tribe gaming compact for class III gaming. In rejecting the NIGC's approval, the court noted that "before a compact may be approved, it must be confirmed that the gaming is anticipated on

Indian lands . . . as required by 25 U.S.C. § 2703(4)." *Id.* at *4.

The Ninth Circuit did not address the *Apache Tribe* decision, but attempted to distinguish the *Erie County* case on the grounds that the gaming ordinance in that case was "site-specific" – that is, it identified the particular sites on which gaming would occur – whereas the Nooksack ordinance is not. *NCCA*, 573 F.3d at 745-46 (App. 14-16). There are two problems with this explanation.

First, the Ninth Circuit's characterization of the *Erie County* decision and the Seneca Tribe's gaming ordinance conflicts with the clear language of that decision. The *Erie County* court's conclusion that no "Indian lands" determination had been made was largely premised on its earlier conclusion that the ordinance was not specific enough regarding one of the possible gaming sites to allow the NIGC to rationally make such a determination. As noted by the *Erie County* court, the Seneca ordinance simply proposed gaming on an unspecified site in Erie County that qualified as "'Nation lands' [and that met] the IGRA's Indian lands definition," *Erie County*, 471 F. Supp. 2d at 325 – an extraordinarily vague formulation very similar to that in the Nooksack gaming ordinance. *See* Nooksack Gaming Ord. 56.04.030.[5] The *Erie County* court concluded that the

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[5] Available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/nooksack/nooksackord102793.pdf (retrieved Dec. 29, 2009).

description in the Seneca ordinance provided an insufficient basis for the NIGC to make a reasoned determination whether the Senecas' gaming facility was located on "Indian lands."

Second, as noted above, the ultimate effect of the Ninth Circuit's explanation is to subject those tribes who are forthcoming regarding their gaming plans to greater scrutiny than those who are reticent or are misleading. In particular, under the Ninth Circuit's rationale, a tribe that offers a site-specific gaming ordinance must be prepared to establish the "Indian lands" status of that site, whereas a tribe that offers a non-site-specific ordinance will face no such scrutiny – and will then be free to locate its gaming facilities as it pleases, subject only to the potential exercise of the NIGC's enforcement powers. This makes no sense, and both Judge Gould, *NCCA*, 573 F.3d at 749 (App. 25) and the *Erie County* court, 471 F. Supp. 2d at 324, recognized the practical and legal insufficiency of this approach.

CONCLUSION

The NIGC's power under the Indian Gaming Regulatory Act to approve tribal gaming ordinances – without first determining the threshold, jurisdictional issue of the "Indian lands" status of the gaming facilities covered by those ordinances – is a question of exceptional importance. The Ninth Circuit's decision approves *ultra vires* action by the NIGC in

contravention of this Court's administrative law jurisprudence, as well as the decisions of other federal courts. Furthermore, the decision threatens to impair the integrity of Congress's carefully crafted regulatory scheme. For all of these reasons, the Court should grant this petition and issue a writ of certiorari.

DATED: January 4, 2010.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTH COUNTY COMMUNITY ALLIANCE, INC.,

Plaintiff-Appellant,

v.

KEN SALAZAR, Secretary of the United States Department of the Interior; DEPARTMENT OF INTERIOR; PHILIP HOGEN, Chairman of the National Indian Gaming Commission; National Indian Gaming Commission,

Defendants-Appellees.

No. 07-36048

D.C. No. CV-07-01098-JCC

OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
March 11, 2009 – Seattle, Washington

Filed July 15, 2009

Before: William A. Fletcher, Ronald M. Gould and Richard C. Tallman, Circuit Judges.

Opinion by Judge William A. Fletcher; Partial Concurrence and Partial Dissent by Judge Gould

COUNSEL

Brian D. Amsbary, Richard M. Stephens, Groen Stephens & Klinge, LLP, Bellevue, Washington, for the appellant.

Rebecca Shapiro Cohen, Brian Kipnis, Office of the United States Attorney, Seattle, Washington, Aaron P. Avila, Robert Lundman, Ronald J. Tenpas, U.S. Department of Justice, Washington, D.C., for the appellees.

OPINION

W. FLETCHER, Circuit Judge:

The North County Community Alliance, Inc., ("Alliance") brought suit against the National Indian Gaming Commission ("NIGC"), the Department of Interior, and those agencies' principal officers (collectively, "Appellees"). The Alliance claims that the NIGC's failure to make an "Indian lands" determination either before approving the Nooksack Indian Tribe's ("Nooksacks'") gaming ordinance (the "Ordinance") in 1993, or before the Nooksacks licensed and began constructing the Northwood Crossing Casino ("Casino") in 2006, violated the Indian Gaming Regulatory Act ("IGRA"). The Alliance also claims that Appellees violated the National Environmental Policy Act ("NEPA") by failing to prepare an environmental impact statement ("EIS") in connection with construction of the Casino.

We hold that the Alliance's challenge to the NIGC's 1993 approval of the Ordinance, insofar as it relates to the licensing and construction of the Casino, is not time-barred. We hold on the merits that the NIGC did not have a duty under IGRA to make an Indian lands determination in 1993 before approving the Nooksacks' non-site-specific proposed gaming Ordinance. We also hold that the NIGC did not have a duty under IGRA to make an Indian lands determination in 2006 when the Nooksacks licensed and began construction of the Casino pursuant to the approved Ordinance. Finally, we hold that there was no violation of NEPA.

I. Background

The Nooksack Indian Tribe is a federally recognized Indian tribe with a reservation in northwestern Washington State near the Canadian border. Beginning in the early 1990s, the Nooksacks sought to engage in tribal gaming.

IGRA requires Indian tribes to receive NIGC's approval of a gaming ordinance before engaging in "class II" or "class III" gaming. 25 U.S.C. § 2710(b), (d). Class II gaming includes bingo and card games except for "banking" card games like baccarat, chemin de fer, and blackjack. *Id.* § 2703(7). Class III gaming includes banking card games and slot machines. *Id.* § 2703(8). The Nooksacks submitted a proposed gaming Ordinance to the NIGC, which the NIGC approved in 1993.

Since shortly after the approval of the Ordinance, the Nooksacks have operated a class III gaming facility on reservation land in Deming, Washington. That facility is not at issue.

The Ordinance does not identify any specific site or sites where gaming might take place. With respect to class II gaming, it provides only that the Nooksack Gaming Commission "shall issue a separate license to each place, facility, or location on Indian lands where Class II gaming is conducted under this ordinance." In 2006, pursuant to the Ordinance, the Nooksacks licensed and began constructing the Casino as a class II gaming facility.

The Casino is located on a twenty-acre parcel owned by the Nooksacks about one-half mile south of the Canadian border and about thirty-three miles by road from the Nooksack reservation. According to the Alliance's complaint, this "parcel of largely undeveloped rural land is mostly surrounded by vacant and non-Indian farming lands and woodlands, is situated near Lynden, Washington [,] and is served by . . . highways, public services and infrastructure provided by Whatcom County and the State of Washington."

The Alliance is a non-profit organization whose stated goal is to protect the environment. According to the complaint, its members include residents and property owners near the Casino site, as well as some members of the Nooksack Tribe.

In July 2007, the Alliance filed suit in federal district court against Appellees.

IGRA limits tribal gaming to locations on "Indian lands" as defined in 25 U.S.C. § 2703(4). The Alliance claims that the NIGC violated IGRA by failing to determine whether the land on which the Casino is built is Indian land, either in 1993 when it approved the Ordinance or in 2006 when the Nooksacks licensed and began constructing the Casino. The Alliance also claims that Appellees violated NEPA by failing to prepare an EIS in connection with the construction of the Casino.

The district court dismissed the Alliance's suit with prejudice under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Alliance timely appealed.

II. Standard of Review

We review de novo questions of law raised in dismissals under Rules 12(b)(1) and 12(b)(6). *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007) (Rules 12(b)(1) and 12(b)(6)); *Granite Rock Co. v. Int'l Bhd. of Teamsters, Freight Constr. Gen. Drivers, Warehousemen & Helpers, Local 287 (AFL-CIO)*, 546 F.3d 1169, 1172 (9th Cir. 2008) (questions of law). This court must accept "all allegations of material fact as true and construe them in the light most favorable" to the Alliance. *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). With respect to NEPA, "we must ensure that the agency has taken a 'hard look' at the environmental

consequences" of proposed actions that constitute "major Federal actions" under 42 U.S.C. § 4332(C). *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

III. Discussion

We address the following questions. First, does the statute of limitations bar the Alliance's challenge to the NIGC's 1993 approval of the Ordinance? Second, was the NIGC required to determine the status of the land on which the Casino could or would be built, either when it approved the Ordinance in 1993 or before the licensing and construction of the Casino in 2006? Third, did Appellees violate NEPA by failing to prepare an EIS before the licensing and construction of the Casino?

A. Statute of Limitations

The applicable statute of limitations provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).

The NIGC approved the Nooksacks' Ordinance in 1993. The construction of the Casino began in 2006. The Alliance filed suit in 2007. The statute of limitations clearly does not bar the Alliance's claim that the NIGC was required to determine in 2006, before licensing and construction, whether the Casino

would be located on Indian lands. The question is whether the statute of limitations bars Alliance's claim that the NIGC was required to determine in 1993, when it approved the Ordinance, the status of the land on which the Casino is now located. For the reasons that follow, we conclude that the statute of limitations does not bar that claim.

Our decision in *Wind River Mining Corp. v. United States* ("*Wind River*"), 946 F.2d 710 (9th Cir. 1991), guides our analysis. In *Wind River,* the Bureau of Land Management ("BLM") had classified certain federal lands as Wilderness Study Areas ("WSAs") in 1979. Mining was forbidden within a WSA. In 1986 and 1987, the Wind River Mining Corporation ("Wind River") asked the BLM to declare that its decision to create WSA 243 was invalid because that particular WSA was not "roadless" as required by statute. The BLM denied the request. In 1987, the Interior Board of Land Appeals denied Wind River's administrative appeal.

Wind River filed suit in 1989 alleging that the BLM's 1979 action in creating WSA 243 was ultra vires. We permitted Wind River's claim to proceed:

> If . . . a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger. Such challenges, by their nature, will often require

> a more "interested" person than generally will be found in the public at large. For example, assuming that Wind River's challenge to the designation of WSA 243 is merited, no one was likely to have discovered that the BLM's 1979 designation of this particular WSA was beyond the agency's authority until someone actually took an interest in that particular piece of property, which only happened when Wind River staked its mining claims. The government should not be permitted to avoid all challenges to its actions, even if *ultra vires,* simply because the agency took the action long before anyone discovered the true state of affairs.

Id. at 715.

In *Artichoke Joe's California Grand Casino v. Norton* ("*Artichoke Joe's*"), 278 F. Supp. 2d 1174 (E.D. Cal. 2003), plaintiffs challenged the Department of Interior's decision to grant federal recognition of the Lytton Rancheria of California as an Indian tribe, even though the challenge was brought more than six years after the recognition occurred. Applying *Wind River,* the district court held that plaintiffs' challenge was not time-barred. It wrote:

> Plaintiffs' claim concerning recognition of Lytton as a tribe is a substantive challenge to the Secretary's recognition decision. Further, when the Secretary made the decision to . . . grant Lytton federal recognition in 1991, plaintiffs could have had no idea that

> Lytton's tribal status would affect them [by leading to tribal gaming nearby].

278 F. Supp. 2d at 1183.

Like the plaintiffs in *Wind River* and *Artichoke Joe's*, the Alliance argues that the NIGC acted ultra vires in approving the Nooksacks' proposed Ordinance in 1993 without first making an Indian lands determination for locations where gaming would be permitted under the Ordinance. "[N]o one was likely to have discovered" that the NIGC's approval was "beyond the agency's authority until someone actually took an interest in" it. *Wind River*, 946 F.2d at 715. The Alliance "took an interest" in 2006 when construction of the Casino began near some of its members' properties. The Alliance "could have had no idea" in 1993 that the NIGC's approval of the Nooksacks' Ordinance "would affect them" in 2006 by leading to construction of a casino thirty-three miles from the Nooksack reservation. *See Artichoke Joe's*, 278 F. Supp. 2d at 1183.

We therefore conclude that the statute of limitations does not bar the Alliance's claim that NIGC was required to determine in 1993 the "Indian lands" status of the parcel on which the Casino was built in 2006.

B. NIGC Duty to Determine Indian Lands Status

The Alliance claims that the NIGC was required to determine the status of the land on which the

Casino could or would be built, either in 1993, when it approved the Ordinance, or in 2006, before the licensing and construction of the Casino. The Alliance contends that the parcel on which the Casino is built is not "Indian land" within the meaning of 25 U.S.C. § 2703(4). However, this question is not before us, as the Alliance acknowledges. Rather, the question before us is whether IGRA required the NIGC to determine the Indian lands status of the Casino parcel in 1993 or 2006.

1. Subject Matter Jurisdiction

We first address our jurisdiction to review the 1993 action, and 2006 inaction, of the NIGC. IGRA specifies various circumstances in which federal courts may review the decisions of the NIGC: "Decisions made by the Commission pursuant to section[ ] 2710 [tribal gaming ordinances], . . . of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5." 25 U.S.C. § 2714. The NIGC's 1993 approval of the Nooksacks' Ordinance was a decision "made by the Commission pursuant to section[ ] 2710." We therefore conclude that we have jurisdiction under § 2714 to review that decision. That is, we have jurisdiction to determine whether the NIGC was required, as part of its approval of the Ordinance in 1993, to make an Indian lands determination with respect to the parcel on which the Casino is located.

The Administrative Procedure Act ("APA") provides that a federal court has jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Appellees appear to concede that we have jurisdiction under this section. We agree with Appellees' apparent concession and conclude that we have jurisdiction. *See Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 930 (9th Cir. 2003) (for judicial review under § 706(1), petitioners "must at least show 'agency recalcitrance . . . in the face of clear statutory duty or . . . of such magnitude that it amounts to an abdication of statutory responsibility'" (ellipses in original)).

2. Merits

a. NIGC's Approval of the Ordinance in 1993

It is undisputed that IGRA authorizes tribal gaming only on "Indian lands" as defined in 25 U.S.C. § 2703(4). IGRA provides that Congress finds that "Federal law does not provide clear standards or regulations for the conduct of gaming *on Indian lands.*" 25 U.S.C. § 2701(3) (emphasis added). IGRA establishes "independent Federal regulatory authority" and "Federal standards" for gaming "*on Indian lands.*" *Id.* § 2702(3) (emphasis added). IGRA provides that an Indian tribe can engage in "class II gaming *on Indian lands* within such tribe's jurisdiction" if certain conditions are met. *Id.* § 2710(b)(1)

(emphasis added). Indian tribes are required to issue separate licenses "for each place, facility, or location *on Indian lands* at which class II gaming is conducted." *Id.* (emphasis added). IGRA provides that class III gaming "shall be lawful *on Indian lands* only" if certain conditions are met. *Id.* § 2710(d)(1) (emphasis added).

Tribal gaming on non-Indian lands is not authorized by or regulated under IGRA. A notice of final rulemaking published by the NIGC in February 2008 stated that "IGRA requires that all gaming take place *on 'Indian lands'*" and "[g]aming that does not take place on Indian lands is subject to all state and local gambling laws and federal laws apart from IGRA." Facility License Standards, 73 Fed. Reg. 6019, 6022 (Feb. 1, 2008) (emphasis added).

The Chairman of the NIGC is required to approve any proposed tribal ordinance concerning class II gaming if the proposed ordinance meets certain specified conditions. 25 U.S.C. § 2710(b)(2) ("The Chairman *shall* approve any tribal ordinance . . . if such ordinance . . . provides. . . ." (emphasis added)). For example, the proposed ordinance must provide (subject to one exception not relevant here) that the tribe will have "the sole proprietary interest and responsibility for the conduct of any gaming activity"; that the net revenues from the gaming activity will be used only for certain specifically described purposes, such as funding tribal government and providing for the general welfare of the tribe; that there will be "annual outside audits"; and

that the construction, maintenance, and operation of the gaming facility will be conducted in such a manner as to protect the environment and the public health and safety. *Id.* § 2710(b)(2)(A)-(C), (E); *see also* 25 C.F.R. §§ 522.4, 522.6.

There is no explicit requirement in IGRA that, as a precondition to the NIGC's approval, a proposed ordinance identify the specific sites on which the proposed gaming is to take place. IGRA specifies only that, pursuant to an approved ordinance, "[a] separate licence issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted." 25 U.S.C. § 2710(b)(1). However, the Alliance argues that NIGC's duty to make an Indian lands determination before approving an ordinance is implicit in IGRA.

The Alliance points out that IGRA provides that the NIGC "shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming *on the Indian lands* within the tribe's jurisdiction" if it satisfies the conditions referred to above. *Id.* § 2710(b)(2) (emphasis added); *see also id.* § 2710(d)(2)(B) (same for approval of class III gaming ordinances). The Alliance argues that the italicized language not only limits the ordinances that the NIGC can approve to those that permit gaming on Indian lands, but also imposes on the NIGC an obligation to make an Indian lands determination when it approves a proposed ordinance. Implicit in the Alliance's argument is a contention that a proposed gaming ordinance must specifically identify

all of the sites at which gaming could or would take place.

In support of its argument, the Alliance cites *Citizens Against Casino Gambling in Erie County v. Kempthorne* ("*Erie County*"), 471 F. Supp. 2d 295 (W.D.N.Y. 2007). Plaintiff in *Erie County* challenged the NIGC's decision to approve a tribal gaming ordinance without first making an "Indian lands" determination. The district court in *Erie County* wrote:

> Whether proposed gaming will be conducted *on Indian lands* is a critical, threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands. If gaming is proposed to occur on non-Indian lands, the Chairman is without jurisdiction to approve the ordinance.

Id. at 323-24. The court held that "the NIGC Chairman has a duty to determine whether a tribe's proposed gaming will occur on Indian lands before affirmatively approving an ordinance." *Id.* at 324.

The gaming ordinance at issue in *Erie County* was different from the Ordinance at issue in this case. The ordinance in that case was a tribal-state compact between the Seneca Nation and the State of New York that was submitted to the NIGC as a proposed class III gaming ordinance. The compact identified three possible sites for class III gaming. It

identified the precise location of two of the three sites. It identified the location of the third site more generally as land "in Erie County, at a location in the City of Buffalo to be determined by the [Seneca] Nation." *Id.* at 327. As part of the compact, the State agreed to assist the Seneca Nation in acquiring parcels at two sites, including the generally described site in the City of Buffalo, and to assist the Seneca Nation in achieving Indian land status for the parcels. After the ordinance was approved by the NIGC, the Seneca Nation purchased a specific parcel in Buffalo. Plaintiffs, who objected to gaming on the Buffalo parcel, contended that the Chairman of the NIGC erred "when he approved the Ordinance without making an 'Indian land' determination with respect to property the [Seneca Nation] intended to acquire for gaming purposes." *Id.* at 322. The district court agreed and vacated the NIGC's approval of the ordinance with respect to the Buffalo parcel, remanding to the NIGC for a determination of the Indian lands status of the parcel. *Id.* at 327.

We are willing to assume without deciding that the district court in *Erie County* was correct in concluding that the NIGC had an obligation to determine the Indian lands status of the Buffalo parcel when it approved the interstate compact as a gaming ordinance for the Seneca Nation. But the Ordinance in the case before us is quite different from

the ordinance at issue in *Erie County*.[1] In the Nooksack Ordinance, no potential gaming sites are identified, either specifically or generally. The only part of the Ordinance that refers in any way to Indian lands is § 56.04.030, which provides that the Nooksack Gaming Commission "shall issue a separate license to each place, facility, or location on Indian lands where Class II gaming is conducted under this ordinance." The letter from the Chairman of the NIGC approving the Nooksack Ordinance stated, "It is important to note that the gaming ordinance is approved for gaming only on Indian lands as defined in the IGRA." But, like the Ordinance itself, the letter identified no potential gaming site, either specifically or generally.

The NIGC states in its brief to us that when a site-specific ordinance is presented for approval it has an obligation to make an Indian lands determination for the specifically identified site or sites. In that circumstance, it makes sense for the NIGC to make an Indian lands determination for the site or sites specifically identified in the proposed ordinance. However, the NIGC contends that it has no obligation to make an Indian lands determination when approving a non-site-specific ordinance.

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[1] We take judicial notice of the Ordinance and the letter from the NIGC approving it. Both documents are available to the public.

The NIGC contends that the text of IGRA does not oblige a tribe to specify in a proposed ordinance, as a condition of the NIGC's approval, all (or even any) of the sites at which the tribe might conduct class II gaming. Nor can we find such an obligation in the statutory text. Absent such an obligation, it would be absurdly impractical to require the NIGC to make an Indian lands determination as part of its approval of an ordinance. In effect, the NIGC would be required to make an Indian lands determination for all lands that are owned, or could be owned in the future, by the tribe and on which the tribe might wish to conduct gaming.

The Alliance appears to recognize the impracticality of requiring the NIGC to make an Indian lands determination as part of its approval of a non-site-specific ordinance. It argues, in effect, that any proposed ordinance submitted to the NIGC must be site-specific. In support of this argument, the Alliance points to one of the enumerated criteria that a proposed class II gaming ordinance must satisfy. Section 2710(b)(2)(E) states that a proposed ordinance must provide that "the construction and maintenance of *the gaming facility,* and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety." 25 U.S.C. § 2710(b)(2)(E) (emphasis added). The Alliance argues that the italicized language necessarily implies that a proposed gaming ordinance must identify specific gaming facilities. We are not convinced. This is the only provision in IGRA

that could be read to imply that gaming ordinances must identify specific gaming sites. It is undisputed that in practice most gaming ordinances approved by the NIGC do not identify specific sites. Moreover, if "*the* gaming facility" is meant to be read literally as the Alliance suggests, this implies that each ordinance is limited to a *single* gaming facility. IGRA plainly contemplates otherwise. *See id.* § 2710(b)(1).

We conclude that IGRA does not require a tribe to submit a site-specific proposed ordinance as a condition of approval by the NIGC under § 2710(b). We also conclude that the NIGC was not required in 1993, when it approved the Nooksacks' non-site-specific Ordinance, to make an Indian lands determination for the parcel on which the Casino is located.

b. NIGC's Failure to Act in 2006

In the alternative, the Alliance claims that the NIGC was required to make an Indian lands determination when the Nooksacks licensed and began construction of the Casino in 2006. However, the Alliance points to nothing in the text of IGRA, or in any implementing regulation in effect in 2006, that required the NIGC to make an Indian lands determination when a tribe licensed or began construction of a class II gaming facility already authorized by a non-site-specific ordinance. Nor have we been able to find anything in the text of IGRA, or in the regulations in effect in 2006, so requiring. We

therefore conclude that NIGC was under no judicially enforceable obligation to make an Indian lands determination in 2006. *See Confederated Tribes,* 342 F.3d at 930.

3. 2008 Regulations

We recognize that IGRA, and its implementing regulations in effect at the times relevant to this suit, operated somewhat awkwardly. A tribe could obtain NIGC approval of a non-site-specific ordinance authorizing class II gaming, and license and build a class II gaming facility pursuant to that ordinance on land that does not constitute Indian land under § 2703(4). If neither the NIGC nor the State initiates a proceeding to enjoin the construction or operation of the facility on the ground that it is not located on Indian land, the tribe could end up operating a class II gaming facility on non-Indian land in violation of IGRA. We do not say that this happened in this case, for we do not know – and are not asked to decide – whether the Casino is located on Indian land. But we recognize that because neither the NIGC nor the State has initiated a proceeding seeking to stop the Nooksacks from constructing and operating the Casino, there has not been, and perhaps never will be, any authoritative Indian lands status determination.

In 2008, the NIGC promulgated regulations that ameliorated the awkwardness we have just described. The validity and proper interpretation of these new

regulations is not before us, and we mention them only to point out that the NIGC seems to be aware of the practical difficulties presented under the law and regulations as they existed at the times relevant to this suit. Under newly promulgated 25 C.F.R. § 522.2(i), the NIGC is authorized to require that a tribe submit Indian lands information when submitting a proposed ordinance for approval. That section provides that "[a] tribe shall provide Indian lands . . . documentation that the Chairman [of the NIGC] may in his or her discretion request as needed." Further, newly promulgated 25 C.F.R. § 559, which regulates the licensing of gaming facilities already approved under an ordinance, now furthers the "purpose" of "ensur[ing] that each place, facility, or location where class II or class III gaming will occur is located on Indian lands eligible for gaming[.]" *Id.* § 559.1(a). The regulation requires a tribe to "submit to the Chairman [of the NIGC] a notice that a facility license is under consideration for issuance at least 120 days before opening any new place, facility, or location on Indian lands where class II or class III gaming will occur." *Id.* § 559.2(a). That notice must contain specified information about the location and status of the property on which the facility is to be located, so that the NIGC may determine whether the property is Indian lands eligible for gaming. *See id.*

4. Dissent

The dissent states that we "disregard[ ] the most salient fact of this case" – that the Casino "may or may not be on Indian lands." Diss. Op. at 8923. It goes on to state that under our approach, "we may never know whether the casino is on Indian lands, and the North County Community Alliance cannot get judicial review to determine whether the casino is properly on Indian lands or not." *Id.* It is true that we may never get an authoritative determination of the Indian lands status of the Casino. But it is not true that we disregard the possibility that an Indian casino might be built on non-Indian land. We openly acknowledge that this is a possibility. Nor is it true that under our approach there can never be an authoritative administrative or judicial determination of the Indian lands status of a proposed or newly constructed casino.

Both the NIGC and the States have authority to bring proceedings against Indian gaming facilities located on non-Indian land. Under 25 U.S.C. § 2713(b)(1) and (2), the NIGC has the authority to order a closure of "an Indian game for substantial violation of the provisions of this chapter." Such provisions include a requirement that gaming be conducted on Indian lands, as the dissent agrees. Further, if Indian gaming is conducted on non-Indian lands, it is subject to gaming regulations of the State in which the gaming facility is located. If a State believes that an Indian casino is located on non-Indian lands, it may bring an appropriate proceeding in state court to ensure compliance with state law.

If the casino is located on non-Indian land and its operation is forbidden under state law, there is nothing in federal law to prevent a state court from enjoining its operation.

We recognize that enforcement or injunctive proceedings by the NIGC or the State are not the same thing as private causes of action brought by an objecting party such as the Alliance. An objecting party may encourage the NIGC or the State to bring such proceedings, but the decision actually to bring a proceeding will be that of the NIGC or the State. For reasons that do not appear in the record, neither the NIGC nor the State has seen fit to bring such a proceeding in this case.

We also recognize that post-construction enforcement or injunctive proceedings against Indian casinos by the NIGC or a State are a less desirable alternative than pre-construction determinations of Indian land status for such casinos. In apparent recognition of this fact, the NIGC has recently promulgated the regulations described above. With the new regulations on the books, it may well turn out that pre-construction determinations by the NIGC of Indian lands status will become the norm for Indian gaming facilities.

The question before us is not whether IGRA and the regulations that existed at the times relevant to this suit were ideally suited to resolving, in a timely fashion, the Indian lands status for proposed tribal casinos. The question, rather, is whether IGRA and

the then-governing regulations required the NIGC to make an Indian lands determination in 1993 when it approved the Nooksacks' proposed non-site-specific Ordinance, or in 2006 before the Nooksacks began construction of the Casino. For the reasons given above, we conclude that the NIGC had no such obligation.

C. NEPA

The Alliance claims that NIGC's failure to make an Indian lands determination constituted a "major Federal action[ ]" under 42 U.S.C. § 4332(C) requiring environmental review, including preparation of an EIS, under NEPA. We disagree. There has been no major federal action in this case. Therefore, the Appellees had no obligation under NEPA.

Conclusion

We hold that the Alliance's claim that the NIGC was required under IGRA to make an Indian lands determination for the parcel on which the Casino is located is not time-barred. We further hold that the NIGC was not required in 1993 to make an Indian lands determination as part of its approval of the Nooksacks' Ordinance, or in 2006 when the Nooksacks licensed and began construction of the Casino. Finally, we hold that Appellees did not violate NEPA.

We therefore affirm the district court's dismissal of the Alliance's complaint under Rule 12(b)(6).

AFFIRMED.

GOULD, Circuit Judge, concurring in part, dissenting in part:

I concur in the majority's opinion Parts I, II, III A, III B 1, III B 2 A, and III C. But I dissent from the majority's conclusions in Part III B 2 B, III B 3, and III B 4 that the NIGC was not required to make an "Indian lands" determination before the casino construction began. I would reverse the district court on this issue. I regret that the majority disregards the most salient fact of this case: The Nooksack Tribe built a casino that may or may not be on Indian lands. The majority acknowledges that we do not know whether it is or not. Maj. op. at 8919. Under the majority's approach, we may never know whether the casino is on Indian lands, and the North County Community Alliance cannot get judicial review to determine whether the casino is properly on Indian lands or not. Because there has never been an Indian lands determination, it remains unclear if the IGRA applies or if local, state and federal regulations apart from the IGRA regime apply.[1]

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[1] If the Nooksack Tribe's casino is not on Indian lands, it is not authorized by the IGRA and all local, state, and federal

(Continued on following page)

The majority leaves the casino in legal limbo, stating that whether this casino is on Indian lands is a question that will be litigated only if the NIGC or state authorities choose to exercise their prosecutorial discretion. The majority concludes that the IGRA has authorized this limbo, and that there is nothing for our court to do. But in my view Congress could not have intended the majority's approach when it enacted the IGRA. Consider this hypothetical set of facts that I hope may be illuminating: If an Indian Tribe, after having received approval on a non-site-specific ordinance, bought land in downtown Seattle, under the majority's approach the NIGC would have no duty to stop the tribe from erecting a casino, even if the land clearly did not fall within the statutory definition of Indian lands. *See* 25 U.S.C. § 2703(4). Thus as the majority sees IGRA, the NIGC would have no duty to act to prevent construction of a clearly unauthorized casino. The majority notes that the state authorities or the NIGC may act, but they also may not. The citizens neighboring the casino site have no way to ensure that the casino is not built on lands that are not Indian lands. I conclude that Congress would never have intended to leave the Indian lands determination to the discretion of the NIGC and state authorities nor did Congress intend to allow the determination to happen after the gaming facility's construction. That would be a

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regulations apart from the IGRA apply. *See* Facility License Standards, 73 Fed. Reg. 6019, 6022 (Feb. 1, 2008).

deplorable way to interpret the statute which could easily lead to grave financial problems for an Indian tribe that had the temerity to build a casino on lands that later turned out to not qualify as Indian lands.

The majority's reliance on the text of a single provision of the statute, without consideration of the surrounding provisions, leads it astray. After considering the IGRA as a whole, I conclude that the majority's interpretation of the statute is inconsistent with the statute's explicitly stated intent, its stated purpose, and the necessary assumptions underlying other provisions of the statute. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 94-95 (1993) (answering a statutory construction question "not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy") (internal quotation omitted); *United Savs. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor.").

The majority's holding that the NIGC has no duty to make an Indian lands determination, which would permit Indian tribe gaming to occur anywhere, is contrary to legislative intent and stated purposes. *See Reves v. Ernst & Young,* 494 U.S. 56, 60-61 (1990) (interpreting the Securities Act in accordance with its purpose). In enacting the IGRA, Congress found there was an absence of "clear standards or regulations for the conduct of gaming *on Indian lands*" and sought to remedy that absence. *See* Indian Gaming Regulatory

Act, Pub. L. No. 100-497 (codified at 25 U.S.C. § 2701(3)) (emphasis added). Congress also noted that "Indian tribes have the exclusive right to regulate gaming activity *on Indian lands*" if the activity is not prohibited by state or federal law. *Id.* § 2701(5) (emphasis added). With these findings Congress could not have intended to create a regime where the NIGC did not have to make Indian lands determinations. Gaming facilities built in the absence of such a determination will thwart the Congressional intent to provide clear standards and regulations of Indian gaming on Indian lands.

Congress also found that gaming is an important means of generating tribal revenue, promoting tribal self-sufficiency and economic development, and these are "principal goal[s] of Federal Indian policy." *Id.* § 2701(4). Allowing the Indian tribe to construct a gaming facility before the tribe knows whether the federal government will recognize it as within its tribal jurisdiction frustrates the goal of promoting tribal economic development and self-sufficiency. If it later became clear that the gaming facility was not on Indian lands, the IGRA would no longer apply, and the facility would be regulated by "all state and local gambling laws and federal laws apart from IGRA." 73 Fed. Reg. at 6022. Thus the majority's holding that no Indian lands determination by the NIGC must precede the construction of an Indian tribal casino is a disaster waiting to happen. These state and local regulations, and federal regulations apart from IGRA, may be stringent or prohibitive, thus depriving the

Indian tribe of their planned economic revenue, and rendering its investment in the gaming facility an economic liability. Such an event would hinder the principal goals of federal Indian policy of promoting self-sufficiency and economic development.

The legislative purposes outlined by Congress in enacting the IGRA also underscore the NIGC's implicit duty to make an Indian lands determination. One of the statute's stated purposes is "to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands . . . are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). How could the NIGC, the agency tasked with regulating and protecting gaming on Indian lands effectuate this intent without determining whether proposed gaming was on Indian lands and thus within its jurisdiction? The NIGC, like all federal agencies, does not have authority that expands beyond what Congress has delegated to it. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency . . . has no power to act . . . unless and until Congress confers powers upon it."). The NIGC, therefore, cannot allow construction of a new gaming facility before it determines that it has jurisdiction over that specific site. *Cf. Citizens Against Casino Gambling in Erie County v. Kempthorne* ("*Erie County*"), 471 F. Supp. 2d 295 (W.D.N.Y. 2007) (determining that the NIGC had to make an Indian lands

determination prior to approving a non-site-specific ordinance). Stated simply, the NIGC has no statutory authority to empower a regime under which tribes could build casinos at any location, whether or not on Indian lands.

The court in *Erie County* held that the NIGC must satisfy its jurisdiction before it approves a general non-site-specific gaming ordinance. *Id.* I do not think that is necessary for a non-site-specific gaming ordinance. The NIGC must have satisfied its own jurisdiction before it regulates class II or class III gaming under the statute, but the NIGC could choose to do this after it approves a general ordinance and before the Indian tribe issues a site-specific license. The NIGC is best left to determine the appropriate procedural method to carry out its duties. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council,* 435 U.S. 519, 524 (1978) (emphasizing that the formulation of procedures is left to the sound discretion of the administrative agency). What is important is that the NIGC make its Indian lands determination before an Indian tribe commences construction on a particular location.[2]

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[2] The NIGC now recognizes that its job must include the ability to make an Indian lands determination after approving a non-site-specific ordinance. The agency has implemented regulations that require an Indian tribe to submit Indian lands information to the NIGC at least 120 days before the tribe issues a new license for a gaming facility, though the regulations do not expressly require NIGC to make an Indian lands determination after getting that information. *See* 25 C.F.R. § 559.2.

Finally, the majority's interpretation of the statute is inconsistent with the policy and necessary assumptions of several other provisions of the statute. *See Timbers of Inwood Forest Assocs.*, 484 U.S. at 371 (interpreting one section of the Bankruptcy Code to be consistent with the policy of other provisions of the Code); *Gade v. Nat.'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99-102 (1992) (interpreting the Occupational Safety and Health Act to be consistent with the assumptions of other provisions). There can be no question that several provisions of the statute apply exclusively to Indian lands and that these sections presuppose that the NIGC will make an Indian lands determination. The statute defines "Indian lands," 25 U.S.C. § 2703(4); it gives the Commission authority to monitor class II gaming "conducted on Indian lands" and to inspect class II gaming facilities "located on Indian lands," *id.* § 2706(b); it provides for the Chairman to approve tribal ordinances concerning the conduct or regulation of class I and class II gaming "on Indian lands," *id.* § 2710(a); the statute forbids that authorized gaming occur on lands acquired by the Secretary in trust for the Indian tribe after the date of the enactment of the Act, with some specific exceptions, *id.* § 2719; and the statute makes theft from gaming establishments "on Indian lands" a federal crime, 18 U.S.C. § 1167-68. In the face of these provisions, how can the NIGC not have an obligation to determine whether a gaming site is Indian lands? I conclude that it must make such a determination. All of these statutory provisions presuppose that the NIGC will determine whether

the gambling site is on Indian lands. Without an Indian lands determination, these provisions make no sense and would be unworkable. Therefore, the policy and necessary assumptions of the statute compel the conclusion that the NIGC has a duty to make an Indian lands determination before allowing casino construction to go forward.

Looking at the IGRA as a whole, I conclude that Congress conferred upon the NIGC a duty to make an Indian lands determination before construction of a gaming facility can commence. The NIGC, as the agency tasked with implementing the IGRA, has the appropriate powers to decide the manner in which it implements this duty, but it was a duty nonetheless that had to be implemented before construction began at the challenged site, an obligation that the NIGC has shirked in this case. I respectfully dissent and would hold that the NIGC has acted in an arbitrary and capricious manner by not fulfilling that duty.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTH COUNTY COMMUNITY ALLIANCE, INC., Plaintiff, v. DIRK KEMPTHORNE, Secretary of the United States Department of the Interior; DEPARTMENT OF THE INTERIOR; THE NATIONAL INDIAN GAMING COMMISSION; and PHILIP HOGEN, Chairman of the National Indian Gaming Commission, Defendants.	CASE NO. C07-1098-JCC ORDER (Filed Nov. 16, 2007)

This matter comes before the Court on Defendants' Motion to Dismiss (Dkt. No. 7), Plaintiff's Response (Dkt. No. 9), and Defendants' Reply (Dkt. No. 14). Having considered the parties' briefing and supporting documentation, and finding oral argument unnecessary, the Court hereby finds and rules as follows.

I. BACKGROUND

Plaintiff is a non-profit organization, organized under the laws of the State of Washington, which is

dedicated to environmental issues in Whatcom County, Washington. (Compl. ¶ 2 (Dkt. No. 1).) Plaintiff's members include property owners in the area affected by a casino project currently under development by the Nooksack Indian Tribe, as well as members of the tribe itself. *Id.* at ¶¶ 3-4. Defendants are federal government officials and agencies with an interlocking set of responsibilities related to the regulation of Indian gaming. *Id.* at ¶¶ 5-8. The Nooksack Tribe is a federally recognized Indian tribe located in the State of Washington. *See* 72 Fed. Reg. 13,648 (March 22, 2007).

In 1993, the Nooksack submitted a tribal gaming ordinance to the National Indian Gaming Commission ("NIGC") for approval pursuant to the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2710. Shortly thereafter, the NIGC issued a list of tribes with approved class III gaming ordinances in the Federal Register that included the Nooksack Tribe. 58 Fed. Reg. 65406 (Dec. 14, 1993). In subsequent years, the NIGC has issued such notice in an identical format, with an updated listing of the tribes with approved class III gaming ordinances, *See, e.g.*, 67 Fed. Reg. 54823 (Aug. 26, 2002). The Nooksack's approved tribal gaming ordinance did not specify any particular site or facility where gaming was to take place; rather, it provided that the Nooksack Gaming Commission "shall issue a separate license to each place, facility, or location on Indian lands where Class II gaming is conducted under this ordinance," *See* Nooksack Tribal Code 56.04.030. The Nooksack Tribe

is currently developing a gaming facility in Whatcom County called the Northwood Casino. The project is not located within the Nooksack reservation, but rather on a site approximately twenty miles away, on land held in trust for the Nooksack Tribe. (Pl.'s Resp. 6 (Dkt. No. 9)); (Dept. of Interior Letter (Dkt. No. 7-4).) Defendants assert that current plans limit this facility to Class II gaming. (Defs.' Mot. 3 (Dkt. No. 7).)

Plaintiff filed the present lawsuit on July 13, 2007, alleging violations of IGRA, the National Environmental Policy Act[1] ("NEPA"), and the Administrative Procedures Act ("APA"). These claims all concern alleged defects in the process by which the NIGC approved the Nooksack Tribe's tribal gaming ordinance, as well as an alleged neglect of ongoing procedural obligations (Compl. ¶¶ 21-45 (Dkt. No. 1).) Plaintiff seeks declaratory and injunctive relief, or in the alternative, a writ of mandamus halting the development of the casino until the alleged procedural deficiencies can be cured. (Prayer for Relief ¶¶ 1-7 (Dkt. No. 1).) The matter now before the Court is Defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

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[1] In the Complaint, Plaintiff bases its second cause of action on the "National Environmental Protection Act." The Court assumes this refers to the National Environmental Policy Act.

II. DISCUSSION

A. Legal Standards

Federal Rule of Civil Procedure 12(b)(1) provides a defense for "lack of jurisdiction over the subject matter" of a claim. An assertion that a court lacks subject matter jurisdiction is a challenge to its "statutory and constitutional power to adjudicate the case, and it may not be waived." 2 MOORE'S FEDERAL PRACTICE, § 12.30[1] (Matthew Bender 3d ed.) ("MOORE'S"); *see also* FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). "The district court must determine questions of subject matter jurisdiction first, before determining the merits of the case." 2 MOORE'S, § 12.30[1].

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal for "failure to state a claim upon which relief can be granted." In deciding a Rule 12(b)(6) motion, the Court must accept as true all well-pleaded allegations of fact in the complaint and construe them in the light most favorable to Plaintiff. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). Dismissal is warranted only if it "appear[s] to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." *Plaine v. McCabe*, 797 F.2d 713, 723 (9th Cir. 1986), However, "[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat

a motion to dismiss for failure to state a claim." *In re Verifone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993).

B. Statute of Limitations

Defendants assert that the only agency action for the purposes of Plaintiffs claims is the NIGC's approval of the Nooksack's gaming ordinance, and that such a challenge is statutorily time-barred. (Defs.' Mot. 9-10 (Dkt. No. 7).) The parties agree on the applicable statutory limit, which states in relevant part that "[e]xcept as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). This is consistent with precedent in this Circuit, which has found that § 2401(a) "should apply to actions brought under the APA which challenge a regulation on the basis of procedural irregularity." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991) (citing *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988) (applying § 2401(a) to bar the Sierra Club's APA challenge to regulations whose adoption purportedly did not comply with the procedural requirements of NEPA)).

The crux of the disagreement is when Plaintiff 's cause of action first accrued. Defendants assert that the limitations period began to accrue when approval of the Nooksack's gaming ordinance was first published in the Federal Register in 1993. (Defs.' Mot. 10

(Dkt. No. 7).) Plaintiff, on the other hand, maintains that the limitations period for its cause of action began to accrue "upon announcement of the Northwood Crossing project," when it "had reason to know" of the individual injury serving as the basis of the action. (Pl.'s Resp. 9 (Dkt. No. 9).) In the alternative, Plaintiff argues that the limitations period began to accrue when the NIGC published notice of its approval of the Nooksack gaming ordinance in the Federal Register in 2002. *Id.*

As a threshold matter, Plaintiff's argument that the 2002 publication in the Federal Register should serve as the point of accrual is entirely without merit. In both its form and professed intention, the 2002 publication is identical to the 1993 notice in the Federal Register cited by Defendants. *See* 58 Fed. Reg. 65406 (Dec. 14, 1993); 67 Fed. Reg. 54823 (Aug. 26, 2002). The only difference between the two documents, both issued by the NIGC, is that the latter reflects a longer, updated list of the tribes with approved gaming ordinances authorizing class III gaming. For present purposes, the critical factor is that both documents listed the Nooksack Tribe. Accordingly, there is no basis for designating the 2002 notice, rather than the 1993 notice, as the point of accrual. Plaintiff argues that rather than serving as the "consolidated and comprehensive" listing that Defendants describe, the 2002 notice entitled its readers to believe it was "an approval of and action upon the Nooksack ordinance as of that date." (Pl.'s Resp. 10 (Dkt. No. 9).) Plaintiff supports this conclusion

with language in IGRA providing that publication in the Federal Register shall occur "[u]pon the approval" of an ordinance or resolution. *Id.* (quoting 25 U.S.C. § 2710(d)(2)(B)(ii). Nothing in this language, however, precludes the NIGC from publishing its recent approvals in periodic, consolidated listings. Furthermore, courts have found under similar circumstances that the reissue of information does not reset the relevant statute of limitations. *See, e.g., Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 n.9 (D.C. Cir. 1983). The confusion Plaintiff describes could only occur if one had neglected to read earlier notices in the Federal Register, an excuse that is antithetical to the principle of constructive notice. In sum, approval of the Nooksack gaming ordinance was first published in the Federal Register in 1993 and subsequent notices issued by the NIGC could do nothing to revise this operative date.

Having decided that the 2002 publication in the Federal Register was not the point of accrual, the question becomes whether, under the circumstances of this case, the 1993 publication triggered the limitations period or whether an event other than publication in the Federal Register should mark the point at which Plaintiff's rights were perfected. Ordinarily, "[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667-68 (9th Cir. 1989). However, certain characteristics of the statutory scheme

of IGRA cast doubt on how this baseline rule is to apply. Pursuant to IGRA's notice requirement, the NIGC issued the 1993 publication in the Federal Register to announce that the Commissioner had approved the Nooksack's gaming ordinance authorizing class III gaming. This publication did not specify the nature or location of any specific project. It was not until over a decade later, when a concrete project at the Northwood Casino site finally materialized, that Plaintiff most probably realized its interest in the matter. This raises the question of whether publication in the Federal Register, under IGRA's scheme of shared authority between the NIGC and Indian tribes, was sufficient to provide even constructive notice of Plaintiff's claims.

The Court concludes that the circumstances of this case do not justify a departure from the general rule. First, Plaintiff's theory is that the NIGC did not make a required determination, which is a procedural claim that should have been apparent at the time the NIGC approved the Nooksack's gaming ordinance. Second, while it would have required familiarity with the statutory scheme of IGRA in order to contemporaneously appreciate the *consequences* of the 1993 gaming ordinance approval, all necessary information for identifying the land potentially affected by the decision was part of the public domain at the time the ordinance was approved. With an approved gaming ordinance authorizing class III gaming under IGRA, the Nooksack Tribe needed to do nothing more, with respect to the NIGC, in order to conduct class II

gaming on its own "Indian lands." Therefore, any piece of property falling within the definition of "Indian lands" was a potential site for a project such as the Northwood Casino.[2] In this respect, this case is distinguishable from one in which "defendant has concealed its acts with the result that plaintiff was unaware of their existence or . . . [plaintiff's] injury was 'inherently unknowable' at the accrual date." *Japanese War Notes Claimants Assoc. of the Philippines, Inc. v. United States*, 373 F.2d 356, 359 (Cl. Ct. 1967) (quoting *Urie v. Thompson*, 337 U.S. 163, 169 (1949)). While it may be little consolation to Plaintiff that all the information necessary to identify its particularized claim was available in the public record, the theory of constructive notice that assumes familiarity with prevailing law is no different in kind from that which assumes familiarity with the content of the Federal Register.

Furthermore, this result comports with a line of ease law in this Circuit that specifically addresses the issue of agency action and accrual of statutory limitations periods. In *Shiny Rock Mining Corp. v. United States*, a 1964 public land order withdrew from appropriation, under the United States mining

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[2] Defendants state that the Nooksack Tribe plans to restrict the Northwood Casino to class II gaming (Defs.' Mot. 3 (Dkt. No. 7)), while Plaintiff speculates that the tribe may really be laying the groundwork for a class III casino. (Pl.'s Resp. 5 (Dkt. No. 9).) The Court does not have enough information to resolve this dispute, which is not material to the issues raised by Defendants' motion.

laws, a section of land within the Williamette National Forest. 906 F.2d 1362, 1363 (9th Cir. 1990). The plaintiff applied for a mineral patent more than fifteen years later, only to be denied on the basis of the order. Plaintiff filed suit "arguing that there were errors and violations of statutes and regulations in the formulation and publication" of the public land order. *Id.* After concluding that the six-year statute of limitations of § 2401(a) applied to the case, the Ninth Circuit found that the statutory period began to accrue upon publication of the public land order in the Federal Register, and therefore the plaintiff's claim was time-barred. *Id.* at 1366. In so doing, the court affirmed the adequacy of the Federal Register as a means of constructive notice, and dispensed with the plaintiff's arguments that it did not have standing and had not suffered an injury during the limitations period. The court explicitly "decline[d] to accept the suggestion that standing to sue is a prerequisite to the running of the limitations period," and characterized the injury, for the purposes of triggering accrual, as "that incurred by all persons when, in 1964 and 1965, the amount of land available for mining claims was decreased." *Id.* at 1365-66.

In *Wind River Mining Corp. v. United States*, the Ninth Circuit saw reason to depart from the result in *Shiny Rock*, while drawing a key distinction. 946 F.2d 710 (9th Cir. 1991). *Wind River* concerned a 1979 Bureau of Land Management decision to establish 138 Wilderness Study Areas ("WSA") on federal land pursuant to the Federal Land Policy and

Management Act of 1976 ("FLPMA"). *Id.* at 711. The plaintiff staked certain mining claims within the affected areas but was barred from pursuing ore-extraction activities, and therefore brought suit claiming that the land in question was improperly classified as a WSA. After identifying § 2401(a) as the operative statute of limitations, the Ninth Circuit found that the plaintiff's claim was not time-barred, even though it was filed more than six years after the Bureau's land designation. The court held that "a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's *application of that decision to the specific challenger*." *Id.* at 716 (emphasis added). The court harmonized its holding with *Shiny Rock* by drawing a distinction between procedural and substantive challenges: "If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years *of the decision*." *Id.* at 715 (emphasis added). The rationale for this distinction was predicated on a delicate balance "between the government's interest in finality and a challenger's interest in contesting an agency's alleged over-reaching." *Id.* Whereas "[t]he government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs," "[t]he government's interest in finality outweighs a late-comers desire to protest the agency's action as a matter of policy or procedure." *Id.*

Taken together, these cases emphasize the nature of a plaintiff's claims in deciding when the statute of limitations to challenge agency action begins to accrue. Recognizing that the line between procedure and substance can be an analytical thicket, it is apparent in this case that Plaintiff's claims are procedural. The Complaint repeatedly characterizes the problem as a failure to make required determinations, rather than a failure to reach the right result. (*See, e.g.*, Compl. ¶¶ 24, 26, 31, 40, 45 (Dkt. No. 1).) Furthermore, responding in part to Defendants' argument that Plaintiff seeks to usurp their enforcement prerogative, Plaintiff explicitly subordinates questions of substance: "Now, in the end, it may be that the Northwood Crossing site does in fact qualify as 'Indian lands" – though the Alliance doubts this. Either way, it is Defendants' duty under IGRA to make this determination, and to make it sooner rather than later." (Pl.'s Resp. 6 (Dkt. No. 9).)

Therefore, to the extent that Plaintiff challenges Defendants' approval of the Nooksack's gaming ordinance based on § 2710(b)(1) ("Indian lands") and § 2710(b)(2)(E) ("environment . . . public health and safety"), the claims are time-barred under 28 U.S.C. § 2401(a), with the six-year limitation period having begun to accrue upon publication in the Federal Register in December 1993. Accordingly, the Court lacks subject matter jurisdiction over these claims under Federal Rule of Civil Procedure 12(b)(1).

C. "Indian Lands" Under IGRA

While the statute of limitations precludes any challenge to the sole agency action taken with respect to this case, this by itself does not dispose of the matter. In addition to the claim that approval of the Nooksack gaming ordinance was flawed at its inception, Plaintiff also advances the theory that IGRA "require[s] Defendants to make an 'Indian lands' determination for each and every facility where tribal gaming is to occur." (Pl.'s Resp. 4 (Dkt. No. 9).) If this is true, then regardless of whether the gaming ordinance should have been approved in 1993, the NIGC still had an ongoing obligation to make a formal "Indian lands" determination with respect to the Northwood Casino site, once it became known.[3] However, in order for Plaintiff to pursue this theory of unlawful omission, there must first be a corresponding right to judicial review.

i. Judicial review under IGRA

Plaintiff argues that IGRA provides for judicial review of Defendants' failure to make an "Indian lands" determination "for each and every facility where tribal gaming is to occur." (Pl.'s Resp. 4

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[3] Plaintiff must be asking for some kind of "formal" determination, since the NIGC's decision not to exercise its enforcement authority with respect to the Northwood Casino necessarily implies that it does not consider the tribe to be in violation of IGRA.

(Dkt. No. 9). The statute explicitly addresses the question of judicial review in § 2714, enumerating the circumstances under which NIGC decisions can be appealed in federal court:

> Decisions made by the Commission pursuant to sections 2710 (Tribal gaming ordinances), 2711 (Management contracts), 2712 (Review of existing ordinances and contracts), and 2713 (Civil penalties) of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

25 U.S.C. § 2714. By what it specifically includes, and therefore excludes, this provision plainly does not support a right to judicial review for an alleged failure to make a formal "Indian lands" determination outside of the context of a gaming ordinance application. Even assuming that IGRA implicitly requires such a determination, it still does not follow that § 2714 implicitly offers the right to judicial review, and Plaintiff offers no support to the contrary.

ii. Judicial review under the APA

Plaintiff also alleges a right to seek judicial review under the APA, which states in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the

> terms of an agency action. The reviewing court shall –
>
> > (1) compel agency action unlawfully withheld or unreasonably delayed;

5 U.S.C. § 706; (Compl. ¶ 45 (Dkt. No. 1).) This provision rests on the premise that the agency has a duty to act in the first place. *See San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 885-86 (9th Cir. 2002); *Friends of the Wild Swan, Inc. v. U.S. EPA*, 130 F.Supp.2d 1184, 1192 (D. Mont. 1999).

Plaintiff argues that IGRA implicitly imposes a duty on the NIGC to make ongoing "Indian lands" determinations as individual gaming projects develop. The statutory basis for the duty, according to this view, is IGRA's provision that "[a]n Indian tribe may engage in, or license and regulate, class II gaming *on Indian lands* within such tribe's jurisdiction," subject to certain conditions. 25 U.S.C. § 2710(b)(1) (emphasis added).[4] Furthermore, Plaintiff cites *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007) for the proposition that IGRA's statutory scheme contains this implicit requirement. (Pl.'s Resp. 7-8 (Dkt. No.

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[4] The statute defines the term "Indian lands" as: "(A) all lands within the limits o f any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4).

9).) Defendants argue that they "do not have a statutory duty to make pre-construction determinations in the first place." (Defs.' Mot. 12-14 (Dkt. No. 7).) Defendants also distinguish *Citizens Against Casino Gambling* as a timely challenge of a tribal gaming ordinance, and by the fact that the ordinance in that case was effectively "site-specific." (Defs.' Reply 3 (Dkt. No. 14).)

There can be no doubt that IGRA limits an Indian tribe's right to conduct class II gaming to "Indian lands," as this term is defined in the statute and implementing regulations. 25 U.S.C. § 2710(b)(1). Therefore, it cannot be the case that no mechanism exists for applying the definition of "Indian lands" to a particular enterprise. The question here is when and how this mechanism is to operate. Because any challenge to the NIGC's original approval of the Nooksack gaming ordinance is statutorily time-barred for the reasons set forth above in subsection B, the precise issue that remains is whether the NIGC must make a formal "Indian lands" determination for each class II gaming facility subsequently developed under a validly approved, non-site-specific gaming ordinance.

The Court concludes that neither the provisions of IGRA, the underlying logic of IGRA's statutory scheme, or the relevant case law, support Plaintiff's position that such a duty exists. The statute offers not even a hint as to when or how the NIGC is to make an "Indian lands" determination, even at the phase in which the NIGC reviews a tribal gaming ordinance. At that time, the statute provides certain

conditions for the conduct of class II gaming by an Indian tribe, including the adoption of an ordinance or resolution by the tribal governing body, that is to be approved by the Commissioner. 25 U.S.C. 2710(b)(1), This same provision also requires *a tribe* to issue a separate license for "each place, facility, or location on Indian lands at which class II gaming is conducted." *Id.* The statute then sets forth the criteria by which the Chairman must abide in granting approval of the tribal ordinance or resolution. *Id.* at (b)(2). Taken together, these provisions require the NIGC to ensure that a tribal gaming ordinance or resolution has certain institutional or systemic characteristics (i.e. limits on the use of net revenues, provision of outside audits), while leaving specific siting decisions to the tribe. There is no corresponding discussion of what the NIGC and a particular tribe must do as these siting decisions are made over time.

Furthermore, if it is some form of hearing that Plaintiff requests, such process is conspicuously absent from IGRA, which states that the NIGC may hold such hearings "as the Commission deems appropriate," 25 U.S.C. § 2706(b)(8), and enumerates certain decisions for which hearings are required. *See, e.g.*, § 2710 (c)(2) (revocation of gaming licenses); § 2710 (c)(6) (removal of certificate of self-regulation); § 2711(f) (modification or voidance of a management contract). The presence of these express provisions tends to refute Plaintiff's theory that the NIGC has an implicit procedural duty to make formal "Indian

lands" determinations with respect to new gaming establishments developed pursuant to a valid, non-site-specific gaming ordinance.

Plaintiff's reliance on *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295 (W.D.N.Y. 2007), is misplaced. That case involved a Tribal-State compact[5] that specifically authorized the tribe to establish gaming facilities at three separate sites, and identified how new land for gaming would be acquired. *Id.* at 307. Within three months after the Tribal-State compact was executed, the NIGC Chairman approved the tribe's class III gaming ordinance. *Id.* at 307, 309. Therefore, consideration of the gaming ordinance was made with particular sites having already been identified by the relevant Tribal-State compact. In rejecting the Government's argument that it was not required to make an "Indian lands" determination upon approving the gaming ordinance, the court found that IGRA implicitly required a determination, and therefore, "[p]rior to approving an ordinance, the NIGC Chairman must confirm that *the situs of proposed gaming is Indian lands*." *Id.* at 323-24.

There are at least a couple reasons why this case is distinguishable from the matter at hand. First, the plaintiff's there were challenging the final agency

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[5] As a prerequisite for conducting Class III gaming activities, IGRA requires that the tribe and relevant state enter into a Tribal-State compact. 25 U.S.C. § 2710(d)(1)(C).

action of approving the tribe's gaming ordinance. For the reasons discussed above in subsection B, this avenue is closed to Plaintiff in this case, with the claim being brought well beyond the six-year statute of limitations. Furthermore, the implicit requirement to make an "Indian lands" determination found in that case was imposed in a context where specific sites had already been identified by the Tribal-State compact. Here, no such site was identified at the time the Nooksack Tribe sought approval of their gaming ordinance, and nothing in IGRA required them to go back to the NIGC before developing their class II facility. In *Citizens Against Casino Gambling*, the NIGC was simply faced with a different calculus at the time it approved the tribal gaming ordinance, and that court did not address whether there is any implicit obligation to initiate ongoing, formal "Indian lands" determinations as specific sites materialize.[6] Absent a statutory duty to make a formal "Indian lands" determination, Plaintiff has no right to judicial review under 5 U.S.C. § 706(1).

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[6] While the immediate question here is when and how the NIGC must make "Indian lands" determinations, it is worth noting that the agency has not been evasive about its substantive position: "With all due respect to Plaintiff, the NIGC does not share this doubt [about whether the Northwood Casino site is on "Indian lands"]. NIGC staff has made appropriate inquires [sic] and has gathered appropriate documentation to inform the NIGC Chairman's enforcement discretion." (Defs.' Reply 4 (Dkt. No. 14).)

D. NEPA Claim

Plaintiff argues that a mandatory "Indian lands" determination also constitutes a "major federal action" triggering environmental review under NEPA. (Pl.'s Resp. 10 (Dkt. No. 9).) Therefore, Plaintiff's NEPA claim hinges on the theory that Defendants had an implicit obligation to make a formal "Indian lands" determination before construction on the Northwood Casino could commence. Since the Court has determined that no such formal, ongoing obligation exists, Plaintiff's NEPA claim fails on its own terms, as there is no "major federal action" that would require environmental review under that statute. 42 U.S.C. § 4332(2)(C).

E. Environmental Review Under IGRA

Plaintiff also argues that the NIGC had an ongoing obligation to make formal findings as to whether "the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety." 25 U.S.C. § 2710(b)(2)(E). This claim fails for the same reason as the "Indian lands" theory in section C(ii). Plaintiff offers no support for the assertion that a formal determination has to be made on an ongoing, site-specific basis.

III. CONCLUSION

While it may be that Plaintiff raises legitimate policy concerns about the Northwood Casino project, the position Plaintiff advances in this lawsuit is either statutorily time-barred or without a proper legal home. Again, the question is not whether the NIGC must ensure compliance with IGRA, but rather how it must do so. IGRA delegates responsibility for Indian gaming to the NIGC, which exercises wide discretion in overseeing the interplay of federal, state, and tribal authorities in this area. Since there appears to be no requirement that tribal gaming ordinances be site-specific,[7] the statutory scheme is one that necessarily relies upon the NIGC's enforcement authority to ensure compliance with the Act. The NIGC's decision not to bring an enforcement action, displeasing as it might be to Plaintiff, is the mechanism the statute sets forth under these circumstances for establishing the lawfulness of the project. Plaintiff places great weight behind the notion that an "Indian lands" determination is necessary to "preserve Defendants' ability to assert any sort of jurisdiction over the Northwood facility in the future." (Pl.'s Resp. 7 (Dkt. No. 9).) However, Defendants have never denied making an "Indian lands" determination, and regardless of how they make that determination, they have no such ability to influence the sweep of their regulatory ambit. Rather than preserving NIGC

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[7] In fact, Defendants specifically aver that site-specific gaming ordinances are "not common." (Defs.' Mot. 3 n.2 (Dkt. No. 7).)

jurisdiction, Plaintiff's position would work an end-run around the NIGC's enforcement prerogative with procedural hurdles not set forth in the statute. Simply put, while tribal gaming under IGRA must occur on "Indian lands" and the NIGC is the agency charged with ensuring this happens, there is no support in the statute or the relevant case law for the proposition that compliance must be enforced by the method of Plaintiff's choosing.

For the foregoing reasons, Defendants' Motion to Dismiss (Dkt. No. 7) is hereby GRANTED.

SO ORDERED on this 16th day of November, 2007.

/s/ John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTH COUNTY COMMUNITY ALLIANCE, INC.,

Plaintiff-Appellant,

v.

KEN SALAZAR, Secretary of the United States Department of the Interior; DEPARTMENT OF THE INTERIOR; PHILIP HOGEN, Chairman of the National Indian Gaming Commission; THE NATIONAL INDIAN GAMING COMMISSION,

Defendants-Appellees.

No. 07-36048

D.C. No. CV-07-01098-JCC
Western District of Washington, Seattle

ORDER

(Filed Oct. 6, 2009)

Before: W. FLETCHER, GOULD, and TALLMAN, Circuit Judges.

Judge W. Fletcher and Judge Tallman have voted to deny the Appellant's petition for rehearing en banc, filed September 10, 2009. Judge Gould voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

25 U.S.C. Section 2702

The purpose of this chapter is –

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

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25 U.S.C. Section 2703

For purposes of this chapter –

. . .

(4) The term "Indian lands" means –

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

. . .

(7)(A) The term "class II gaming" means –

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that –

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include –

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

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25 U.S.C. Section 2710

25 U.S.C.A. § 2710

(a) Jurisdiction over class I and class II gaming activity

. . .

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if –

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that –

. . .

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; . . .